No. ~~1091~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-53

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellant

v.

RAYMOND BELCHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 (i) (e) of the rules of this Court, the appellee, Raymond Belcher, moves to affirm the judgment of the District Court for the Southern District of West Virginia, at Bluefield, West Virginia, The Honorable Judge Sidney L. Christie.

STATEMENT

Appellee was awarded a period of disability and entitlement to disability insurance benefits pursuant to the provisions of Section 216 (i) and 223 of the Social Security Act, United States Code, Title 42, Section 416 (i) (Tr. 57-58) based on his application of May 20, 1968. The appellee, pursuant to the decision of the ap-

pellant, became entitled to benefits commencing October, 1968, in the amount of $156.00 per month. His wife and three (3) children became entitled to benefits on the appellee's earnings record in the amount of $57.90 each effective October, 1968, for a total family benefit of $329.70 per month. The appellee became entitled to total temporary disability benefits under the West Virginia Workmen's Compensation Act at the rate of $47.00 per week, or $203.60 per month commencing March 25, 1968, (Tr. 29-30) based upon the decision of the Commissioner of the West Virginia Workmen's Compensation Fund dated May 6, 1968, under Claim Number 68-35807 (Tr. 61).

The appellant thereafter reduced the benefits of the appellee's wife and three children from $57.90 per month, each, to $23.10 per month, each, thus reducing the total family benefit from $329.70 to $225.30, for a total reduction of monthly benefits of $104.40 per month based upon the receipt of temporary total disability benefits from the West Virginia Workmen's Compensation Fund (Tr. 61) (Tr. 65) by the appellee. The appellant rendered his decision based on the application of Section 224 of the Social Security Act, 42 U.S.C. (Supp. 5, 1965-69), 424 (a)[1], advising the appellee the manner in

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1

Section 224 of the Social Security Act, 42 U.S.C.A. Section 424, as amended, July 30, 1965 and January 2, 1968, provides:

"(a) If for any month prior to the month in which an individual attains the age of 62 ——

"(1) such individual is entitled to benefits under section 223, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month, the total of his benefits under section 223 for such month and of any benefits under section 202 for such month based on his wages and self-employment income will be reduced (but not below zero) by the amount by which the sum of ——

"(3) such total of benefits under sections 223 and 202 for such month, and

which Section 224 of the Social Security Act was being applied (Tr. 57-58). The appellee thereafter objected to this decision, and a hearing was held on October 9, 1969 (Tr. 7), and a decision rendered by the appellant based on such hearing dated October 31, 1969, (Tr. 7-12) denying the appellee's relief and affirming the prior decision of the appellant. The appellee thereafter requested review of this denial ((Tr. 5) and the appellant concluded again that its action was correct under the law, and affirmed its prior determinations (Tr. 3). The appellee, dissatisfied with this decision of the appellant, commenced civil action in the United States District Court for the Southern District of West Virginia, at Bluefield, West Virginia, purusant to authority of the statutes of the United States, as set forth in United States Code, Title 42, Section 405 (g), being Section 205 (g) of the Social Security Act, as amended, to obtain a judicial review of the appellant's decision reducing the appellee's wife's and children's benefits under the appli-

Footnote 1 continued:

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan, exceeds the higher of ——

"(5) 80 per centum of his 'average earnings', or

"(6) the total of such individual's disability insurance benefits under section 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section. In no case shall the reduction in the total of such benefits under sections 223 and 202 for a month (in a continuous period of months) reduce such total below the sum of ———

"(7) the total of the benefits under section 223 and 202, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

"(8) any increase in such benefits with respect to such individual and such persons, before the reduction under this section, which is made effective for months after the first month for which reduction under this section is made."

cation of Section 224 of the Social Security Act by reason of receipt of the appellee of temporary total disability benefits under the West Virginia Workmen's Compensation Act due to an industrial injury of March 25th, 1968, contending that the appellant, in applying the provisions of Section 224 of the Social Security Act, violated his constitutional rights in that it deprived the appellee of his property right without due process of law and that the Act is discriminatory and thus unconstitutional in that it treats persons in the same class differently, specifically stating that the Act did not apply to recipients of disability insurance benefits whose period of disability was established prior to June 1, 1965, and singles out persons who are only recipients of Workmen's Compensation benefits based upon industrial accidents and not applying to any recipients who may have income from other sources than a State Workmen's Compensation Fund. The Honorable Judge Sidney L. Christie, in an opinion dated September 10, 1970, as set forth in (Appendix A, infra, pp. 8 to 16), held that the appellant could not constitutionally apply Section 224 of the Social Security Act to the appellee under the circumstances of his case, since to do so would deprive him of due process of law and of equal protection of the law under the Fifth and Fourteenth Amendments. The appellant thereafter, pursuant to order entered by the District Court, (Appendix A, infra, pp. 17 and 18), made application for a direct appeal to this Court under the provisions of 28 U.S.C. 1252.

ARGUMENT

The appellant contends that Section 224 of the Social Security Act is not violative of the due process clause of the Fifth Amendment and equal protection under the same amendment to the Constitution of the United States of America stating that the reliance of the Court below on the characterization of West Virginia Workmen's Compensation benefits as private in nature is mis-guided, is erroneous and certainly not supported

by the West Virginia Code, Chapter 23, Article 2, Sections 1, 6, 6a, 7, 8 and 9, Code of West Virginia, 1931, as amended, as set forth in Appendix B, infra, pp. 19 to 29. With the exception of certain state agencies, the West Virginia Workmen's Compensation Act makes it voluntary whether an employer elects to be a member of the Fund or elects to be a self-insurer after certain compliances or whether he elects not to be a member thereof. If an employer does not become a member of the Fund, nor elects to be a self-insurer under the Fund, he may nevertheless provide his own payment to injured employees during the course of and resulting in their employment, in which case Section 224 of the Social Security Act would not be applicable. The disadvantage of not being a member of the Fund is that the common law defenses of contributory negligence, the assumption of risk and fellow servant rule are not available to employers in the event of a tort action by the employee. The statement of the appellant that employers who elect not to participate in the Fund must provide their own method of compensation is an incorrect statement of the law. The District Court in its opinion citing *Goldberg* vs. *Kelly,* 397 U. S. 254 as authority for the proposition that once the statutory requirements are met, the status of a property right thus appears to be vested and must, therefore, be closeted with the safeguards of due process. It appears that what the Court is saying in *Goldberg* vs. *Kelly*, et seq, is that when the statutory requirements are met by an applicant for welfare benefits, a status is created which is protected by due process. Using this rationale it would be equally true that once an applicant for Social Security benefits has met all of the required disability requirements, that applicant then has such right under the reasoning of the *Goldberg* vs. *Kelly* case, et seq, which is protected under the due process clause. The fact that the applicant for such status under the Social Security Act contributes his own money to such Fund gives added weight that he has a vested property right once he meets the requirements to receive funds therefrom, that must be protected with due process. To

permit Congress to set up requirements for an applicant to receive benefits under the Act, and have him to qualify for such benefits, only to have them reduced or taken completely away from him by reason of a contractual status with his employer and have it apply only to him is discrimination in its worst form and does not provide equal protection under the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States of America provides in pertinent parts, that:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . .".

Although the Fifth Amendment to the Constitution of the United States of America provides a restraining and protecting effect on Federal Governmental action, it does not specifically contain an equal protection clause; it does, however, forbid discrimination that is so unjustifiable as to be violative of due process. *Bolling* vs. *Sharpe,* 347 U.S. 497, 74 St. Ct. 693.

The provisions of 42 U.S.C.A. 424 (a), being Section 224 of the Social Security Act is contrary to the purpose of the Social Security Act, and bears no rational relation to the purpose of the Social Security Act. A statute which operates to the detriment of persons who are to be benefited by the statutes and thus, subverts the very objective that it is intended to serve, violates due process, and this appears to be abundantly clear from the close reading of the dissent in the *Fleming* vs. *Nestor* case, 363 U.S. 603, at p. 623, when Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character comments:

> " 'It comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles — that what is due as a matter

of earned right is far better than a gratuity . . . .

> " 'Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.' "

Thus with this strong dissent in the *Nestor* case, et seq, the reasoning espoused in the *Goldberg* vs. *Kelly* case, et seq, takes on real significance when we try to apply the arbitrary and discriminatory provisions of Section 224 of the Social Security Act to two classes of disabled workers essentially indistinguishable from each other except that one is composed of those disabled persons who receive Workmen's Compensation benefits and the other is composed of those disabled persons who also receive benefits from other sources such as private disability insurance plans or tort claim awards or sick pay benefits.

CONCLUSION

In conclusion, it is clear that the appellee has met the disability requirements of the Social Security Act and thus a property right status created that must thereafter be protected from the arbitrary and discriminatory limitations placed on such right by acts of Congress as is contained in 42 U. S. C. A. 424 (a) which defeats or seriously impairs the very purpose of the Social Security Act. To argue that Section 224 of the Social Security Act is to prevent duplication of public funds in the instance case is without foundation, as was so clearly pointed out in the learned District Judge's opinion of September 10, 1970. It is, therefore, respectfully submitted that the decision of the District Court should and must be affirmed.

Respectfully submitted.

MARSHALL G. WEST
Attorney at Law
Pineville, West Virginia
Attorney for Appellee

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

RAYMOND BELCHER,

Plaintiff

VS. CIVIL ACTION NO. 1185

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare,

Defendant

September 10, 1970

ATTORNEY FOR PLAINTIFF:

Marshall G. West
West, Blackshear and Rundle
Attorneys at Law
Pineville, West Virginia

ATTORNEYS FOR DEFENDANT:

Honorable W. Warren Upton
United States Attorney
Charleston, West Virginia

Honorable Leo J. Meisel
Assistant U. S. Attorney
Huntington, West Virginia

CHRISTIE, DISTRICT JUDGE:

This is an action under Section 205(g) of the Social Security Act, 42 U.S.C.A. 405(g), to review a final decision of the Secretary of Health, Education and Welfare. A decision by a hearing examiner on October 31, 1969, became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. The matter is before the Court on the cross motions of the parties for summary judgment pursuant to Rule 56.

The plaintiff filed an application for disability insurance benefits on May 20, 1968, alleging that he became unable to work on March 25, 1968, as the result of an injury. On May 20, 1968, his wife and children also applied for benefits under the Act. The Secretary having determined that plaintiff was disabled within the meaning of the Act, all applicants were awarded benefits on September 30, 1968, such benefits to begin with the month of October 1968.

Later, plaintiff received an award of $203.60 per month from the Workmen's Compensation Fund of West Virginia as the result of a work-related injury. Upon learning of this award, the Social Security Administration applied the "offset" provisions of Section 224 of the Social Security Act, 42 U.S.C.A. 424(a).[1]

1

Section 224 of the Social Security Act, 42 U.S.C.A. Section 424, as amended, July 30, 1965 and January 2, 1968, provides:

"(a) If for any month prior to the month in which an individual attains the age of 62—

"(1) such individual is entitled to benefits under section 223, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

On February 10, 1969, plaintiff's attorney requested a reconsideration of the offset reductions which the Administration rejected on July 19, 1969. Thereupon, said attorney requested a hearing, held October 9, 1969, at which he presented argument supporting his claim that Section 224 deprived plaintiff and his family of a prop-

Footnote 1 continued:

the total of his benefits under section 223 for such month and of any benefits under section 202 for such month based on his wages and self-employment income will be reduced (but not below zero) by the amount by which the sum of—

"(3) such total of benefits under sections 223 and 202 for such month, and

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of —

"(5) 80 per centum of his 'average earnings', or

"(6) the total of such individual's disability insurance benefits under section 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 223 and 202 for a month (in a continuous period of months) reduce such total below the sum of —

"(7) the total of the benefits under sections 223 and 202, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

"(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made."

erty right without due process of law and that it was discriminatory inasmuch as it discriminated unfairly between persons of a similar class. On October 31, 1969, the hearing examiner issued his opinion upholding the legality of the reduction of benefits. This decision became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. Thereupon, plaintiff timely filed the instant action in this court.

I

As previously noted (footnote 1), Section 224 provides for a reduction in social security disability benefits for such time as the claimant receives workmen's compensation benefits for either total or partial disability. Workmen's compensation laws generally provide compensation to employees for loss resulting from industrial aceidents and disease growing out of or resulting from their employment. The need for such a system arose out of conditions produced by modern industrial development and was premised upon the idea that the common-law rule of liability for personal injuries incident to the operation of industrial enterprises, which was based upon the negligence of the employer, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, was outmoded by modern conditions.

West Virginia's Workmen's Compensation Law is found in Chapter 23 of the West Virginia Code. The law creates a "Workmen's Compensation Fund" which is sustained by contributions made to it by the employers who voluntarily elect to come under the provisions of the law, such contributions being based upon a percentage of the gross wages of their employees. The employees make no direct monetary contributions to the fund and the system is state-operated. Basically, the law takes from the employee his common-law right to sue his employer for damages for negligence in return for payment from the fund of limited or scheduled benefits for disability or death resulting from or growing out of the

employment relationship, regardless of any fault of the employer.

In West Virginia the relation of employer and employee, under the law, is termed contractual in nature, the statute becoming an integral part of the contract of employment, and imposing upon the employer and employee, respectively, a limitation of rights and liabilities. *Gooding* v. *Ott,* 77 W. Va. 487, 87 S.E. 862; *Lancaster* v. *State Compensation Comr.,* 125 W. Va. 190, 23 S.E. 2d 601. Thus, in no sense of the word can one's workmen's compensation benefits be termed a gratuity; rather they must be treated as a contractual entitlement. So it is seen that the issue before this Court as to this aspect of the case is whether or not Section 224 of the Social Security Act, requiring reduction in plaintiff's social security benefits in proportion to the amount of his workmen's compensation benefits, may be constitutionally applied.

II

It cannot be seriously contended that the Social Security Act itself is unconstitutional for its constitutionality has been upheld in a long line of cases. *Helvering* v. *Davis,* 301 U.S. 619 (1937). See also *Steward Machine Company* v. *Davis,* 301 U.S. 584 (1937), and *Carmichael* v. *Southern Coal and Coke Company,* 301 U.S. 495 (1937). It is equally well settled that entitlement to social security benefits is subject to all conditions set out in the Social Security Act under which benefits are to be paid. *Flemming* v. *Nestor,* 363 U.S. 603 (1960); *Gruenwald* v. *Gardner,* 396 F. 2d 591 (2d Cir. 1968), cert. den. *Gruenwald* v. *Cohen,* 393 U.S. 982 (1968); *Price* v. *Flemming,* 168 F. Supp. 392 (D.Ct. N. J. 1968), affirmed 280 F. 2d 956 (3d Cir. 1960), cert. den. 365 U.S. 817 (1961).

Notwithstanding, as previously noted, plaintiff urges that the offset provision of Section 224 deprives him of his property (benefits) without due process of law. The answer would seem to hinge upon whether the plaintiff has such an indefeasible right or interest in his

social security benefits that the concept of due process precludes application of the offset statute.

In *Flemming* v. *Nestor,* supra, the Court found that the old-age benefits of an alien, deported for cause under the Immigration and Nationality Act, could be lawfully terminated without offending the Due Process Clause of the Fifth Amendment. There the Court rationalized that the noncontractural interest of an employee covered by the Social Security Act cannot be analogized to that of the holder of an annuity, where the right to benefits is based on a contractual duty to pay premiums, and further, that to hold otherwise would render the law too inflexible to permit necessary adjustment to ever-changing conditions. Justices Black, Douglas and Brennan dissented, each filing a separate dissenting opinion and each strongly arguing that the alien had a property right in his old-age benefits and to deprive him of them was a violation of due process.

We have been referred to several unreported decisions of district courts and one reported decision, *Bartley* v. *Finch,* 311 F. Supp. 876 (E.D. Ky. 1970), in support of the defendant's position that Section 224 may be constitutionally applied, and it would indeed be easy for us to follow that path. However, we are not convinced that the issue raised in this case deserves such cavalier treatment, especially in view of the more recent decision of the Supreme Court in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), which tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process. Such benefits, the Court states (p. 262), are a matter of "statutory entitlement for persons qualified to receive them," and as support for this conclusion the Court, in footnote 8 of the same page, refers to an article in the Yale Law Review stating that,

> "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' "

Therefore, since the Court in *Goldberg* appears to have

determined that entitlement to welfare is in the nature of a property right, protected by the Due Process Clause of the Fifth Amendment, by the same rationale it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection. For it seems to us to be patently unfair for the welfare recipient, under *Goldberg,* to have a "property right status" with all the procedural safeguards of due process, while the social security recipient, under *Nestor,* is deprived of such status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed, it appears to run counter to the intent of Congress as reflected by the comments by Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character, as quoted in the *Nestor* dissent, p. 623:

> " 'It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles — that what is due as a matter of *earned right* is far better than a gratuity . . . . (emphasis added)
>
> " '*Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right,* the individual is eligible to receive his benefit in dignity and self-respect.' " (Emphasis added)
> 102 Cong. Rec. 15110.

Thus, we must conclude that the concept espoused by the majority in *Nestor,* that one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right to such benefits, is no longer to be considered a viable and controlling prece-

dent for that principle, in view of the more recent holding in *Goldberg* that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have a recognizable property right to such benefits and one which is protected by all the safeguards of due process.

III

The other issue raised by the plaintiff is that the offset provision of Section 224 creates arbitrary discrimination between two classes of disabled workers, essentially indistinguishable from each other except that one is composed of those disabled persons who also receive workmen's compensation benefits and the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards, and that on the basis of this difference alone the first class has benefits reduced while the second class has benefits left untouched. In other words, the plaintiff complains that it is patently arbitrary to single out for the purpose of applying the offset *only* those who are receiving workmen's compensation and exclude those who are receiving benefits from other sources. The plaintiff further argues that the offset provision also discriminates between those who were disabled prior to June 1, 1965 and those who become disabled after June 1, 1965.

The defendant, in justification of these discriminatory features of the offset provision, argues that its purpose was to avoid duplication of *public* benefits. If this be its true purpose, it is certainly a laudable one and one with which this Court could wholeheartedly accept. However, the argument is inapplicable here for, as previously shown, workmen's compensation in West Virginia is not a gift from the public largesse, but rather is an entitlement arising from a contractual relationship between employer and employee, sanctioned by law, whereby each gave up a legal right in return for a concomitant legal benefit. That no public funds are involved is made abundantly clear by the provisions of West Virginia Code, 23-3-1. There, it is provided that the

Workmen's Compensation Fund shall be supported by "premiums and other funds paid thereto by employers," from which shall be paid all benefits due the employees or their dependents and the expenses of administering the law. No public funds being thus involved, the defendant's argument that plaintiff's workmen's compensation award should be treated as a public benefit obviously becomes quite untenable and must be rejected.

In sum, therefore, it is held that in the circumstances of plaintiff's case, the application of Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments. The motion of the plaintiff for summary judgment will accordingly be granted and the motion of the defendant for summary judgment will be denied.

An appropriate order may be presented making this opinion a part of the record.

SIDNEY L. CHRISTIE

United States District Judge

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

RAYMOND BELCHER,
Plaintiff,

v. CIVIL ACTION NO. 1185

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare,
Defendant.

JUDGMENT ORDER

This cause having been submitted on brief, the transcript of record certified to this Court in the manner prescribed by law, and upon paintiff's and defendant's motion for summary judgment; and the Court having made its findings of fact and conclusions of law, as appears from its memorandum opinion dated September 10, 1970, in which this Court expressed the opinion that defendant's motion for summary judgment should be denied, and that an order should be entered denying the defendant the right to offset workmen's compensation payments from the Social Security benefits made to plaintiff, it is, therefore

ADJUDGED and ORDERED that the memorandum opinion of the Court, dated September 10, 1970, be, and the same is hereby filed and made a part of the record in this action, and that the decision of the Secretary of Health, Education, and Welfare, applying the offset provisions of Section 224 of the Social Security Act be, and the same is hereby reversed, and the proposed offset by the Secretary against the plaintiff be, and it is hereby denied.

And be it further ADJUDGED and ORDERED:

(1) That counsel for the defendant shall promptly file with the Court a report stating the amount of the initial past due benefits to be paid the plaintiff and/or any ancillary beneficiaries, pursuant to ths judgment order. A copy of such report shall be furnished by the defendant to counsel for the plaintiff; and

(2) That counsel for the plaintiff shall, within fifteen (15) days of the entry of this judgment order, file with the Court a verified petition for the approval and allowance of a fee for representing the plaintiff in this Court, pursuant to the provisions of Section 206(b)(1) of the Social Security Act, as amended July 30, 1965, 42 U.S.C.A. 406(b)(1), exhibiting therewith the original or a duplicate-original of any written contract of employment between the attorney and the plaintiff, and in any event, showing (a) what services were rendered by the attorney in the case and specifically the amount of time he devoted to it in this Court; (b) what expenses, if any, were personally incurred by the attorney in the prosecution of the case in this Court and for which he has not been reimbursed by his client; and (c) what sums, if any, have been paid the attorney by the plaintiff or by anyone for the plaintiff for services rendered in this Court. The petition must also contain an affirmation by the attorney that he will neither demand, receive nor accept from the plaintiff or from anyone for the plaintiff, any fee or remuneration for services rendered in this case in this Court other than that approved and allowed by this Court pursuant to such petition.

And this case shall remain upon the docket until such statement of initial benefits shall have been received from the defendant and until the matters arising upon the petition for the approval and allowance of an attorney's fee to counsel for the plaintiff shall have been adjudicated.

ENTER: ....., 1970

.....

United States District Judge

APPENDIX B

W. Va. Code, Chapter 23, Article 2, provides:

Section 1. Employers and Employees, including State, Its Agencies and Political Subdivisions Subject to Chapter.—The state of West Virginia and all governmental agencies or departments created by it, including county boards of education, are hereby required to subscribe to, and pay premiums into, the workmen's compensation fund for the protection of their employees, and shall be subject to all requirements of this chapter, and all rules and regulations prescribed by the commissioner with reference to rates, classification and premium payments.

All persons, firms, associations and corporations regularly employing other persons for the purpose of carrying on any form of industry, service or business in this state, including county courts, municipalities, other political subdivisions of the state, and civil defense organizations organized under article five, chapter fifteen of this code, are employers within the meaning of this chapter and subject to its provisions: Provided, That the provisions of section eight, article two of this chapter shall not apply to such county courts, municipalities, other political subdivisions of the state, or civil defense organizations organized as aforesaid: Provided, however, That the failure of such county courts, municipalities, other political subdivisions of the state, or civil defense organizations organized as aforesaid, to elect to subscribe to, and to pay premiums into, the workmen's compensation fund, shall not impose any liability upon them, or either of them, other than such liability as would exist notwithstanding the provisions of this chapter. All persons in the service of employers as herein defined, and employed by them for the purpose of carrying on the industry, business, service, or work in which they are engaged, including persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state, and

check-weighmen employed according to law, all members of rescue teams assisting in mine accidents with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the director of the department of mines, and all forest fire fighters who, under the supervision of the director of the department of natural resources or his designated representative, assist in the prevention, confinement and suppression of any forest fire, are employees within the meaning of this chapter and subject to its provisions: Provided further, That this chapter shall not apply to employers of employees in domestic service or persons whose employment is prohibited by law, nor to employees of an employer while employed without the state, except in case of temporary employment without the state as hereinbefore provided; nor shall a member of a firm of employers, or any official of an association or of a corporate employer, including managers, or any elective or appointive official of the state, county, courty court, board of education, municipality, other political subdivision of the state, or civil defense organization organized as aforesaid, whose term of office is definitely fixed by law, be deemed an employee within the meaning of this chapter: And provided further, That employers of not more than three employees for a period of not more than one month, who shall be called herein "casual employers", employers of employees in agricultural service and duly incorporated volunteer fire departments or companies may voluntarily elect to subscribe to, and pay premiums into, the workmen's compensation fund for the protection of the employees of such employers and all of the members, including the chief, commander or other officials thereof, of such duly incorporated volunteer fire departments or companies, and in such case shall be subject to all requirements of this chapter and all rules and regulations prescribed by the commissioner with reference to rates, classifications and premium payments, but such casual employers, employers of employees in agricultural service and duly incorporated volunteer fire departments or companies shall not be required to subscribe to the workmen's com-

pensation fund and their failure to subscribe to such fund shall not impose any liability upon them other than such liability as would exist notwithstanding the provisions of this chapter; nor shall the provisions of section eight of this article apply to casual employers, employers of employees in agricultural service or to such duly incorporated volunteer fire departments or companies.

The premium and actual expenses in connection with governmental agencies and departments of the state of West Virginia shall be paid out of the state treasury from appropriations made for such agencies and departments, in the same manner as other disbursements are made by such agencies and departments.

County courts, municipalities, other political subdivisions of the state, county boards of education, civil defense organizations organized as aforesaid, any duly incorporated volunteer fire departments or companies which shall elect to become subscribers to the workmen's compensation fund shall provide for the funds to pay their prescribed premiums into the fund, and such premiums, and premiums of state agencies and departments, including county boards of education, shall be paid into the fund in the same manner as herein provided for other employers subject to this chapter. In addition to its usual and ordinary meaning, the term "Employer" or "employers", as used in this chapter, shall be taken to extend to and include any duly incorporated volunteer fire department or company, or civil defense organization organized as aforesaid, which shall elect to subscribe to, and pay premiums into, the workmen's compensation fund, and in addition to its usual and ordinary meaning, the term "Employee" or "Employees", as used in this chapter, shall be taken to extend to and include all of the members of any such department, company or organization. All duly incorporated volunteer fire departments or companies, and civil defense organizations organized as aforesaid, which shall elect to subscribe to, and pay premiums into, such fund, shall be placed in a separate group or class of subscribers

to be established by the commissioner, and such departments, companies or organizations shall pay into the fund such premiums (computed, notwithstanding the provisions of section five of this article, on such basis as to the commissioner shall seem right and proper) as may be necessary to keep such group or class entirely self-supporting.

Any employer whose employment in this state is to be for a definite or limited period, which could not be considered "regularly employing" within the meaning of this section, may elect to pay into the workmen's compensation fund the premiums herein provided for, and at the time of making application to the commissioner such employer shall furnish a statement under oath showing the probable length of time the employment will continue in this state, the character of the work, an estimate of the monthly payroll, and any other information which may be required by the commissioner. At the time of making application such employer shall deposit with the state compensation commissioner to the credit of the workmen's compensation fund the amount required by section five of this article, which amount shall be returned to such employer, if his application be rejected by the commissioner. Upon notice to such employer of the acceptance of his application by the commissioner, he shall be an employer within the meaning of this chapter and subject to all of its provisions.

Any foreign corporation employer electing to comply with the provisions of this chapter and to receive the benefits hereunder, shall, at the time of making application to the commissioner, in addition to other requirements of this chapter, furnish such commissioner with certificate from the secretary of state showing that it has complied with all the requirements necessary to enable it legally to do business in this state, and no application of such foreign corporation employer shall be accepted by the commissioner until such certificate is filed.

For the purpose of this chapter, a mine shall be adjudged within thic state when the main opening, drift, shaft or slope is located wholly within this state.

Any employee within the meaning of this chapter whose employment necessitates his temporary absence from this state in connection with such employment, and such absence is directly incidental to carrying on an industry in this state, who shall have received injury during such absence in the course of and resulting from his employment, shall not be denied the right to participate in the workmen's compensation fund.

Sec. 6. Exemption of Contributing Employers from liability. — Any employer subject to this chapter who shall elect to pay into the workmen's compensation fund the premiums provided by this chapter shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after such election and during any period in which such employer shall not be in default in the payment of such premiums and shall have complied fully with all other provisions of this chapter: Provided, That the injured employee has remained in his service with notice that his employer has elected to pay into the workmen's compensation fund the premiums provided by this chapter. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employer or his or her parents would otherwise have.

Sec. 6-a. Exemption from Liability of Officers, Managers, Agents, Representatives or Employees of Contributing Employers.—The immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

Sec. 7. Notice to Employees; Waiver of Benefits of Chapter by Contract Prohibited.—Each employer electing to pay the premiums provided by this chapter into the workmen's compensation fund, or electing to make direct payments of compensation as hereinafter provided, shall post and keep posted in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such election, and the same when so posted shall constitute sufficient notice to all his employees and to parents of any minor employees of the fact that he has made such election. No employer or employee shall exempt himself from the burden or waive the benefits of this chapter by any contract, agreement, rule, or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

Sec. 8. Election Not to Pay or Default in Payment of Premiums; Defenses Prohibited.—All employers subject to this chapter, except the state of West Virginia and the governmental agencies or departments created by it, who shall not have elected to pay into the workmen's compensation fund the premiums provided by this chapter and have not elected to pay individually and directly or from benefit funds compensation and expenses to injured employees or fatally injured employees' dependents under the provisions of section nine of this article, or having so elected shall be in default in the payment of the same; or not having otherwise fully complied with the provisions of section five or section nine of this article, shall be liable to their employees (within the meaning of this article) for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees while acting within the scope of their employment and in the course of their employment and also to the personal representative of such employees where death results from such personal injuries, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common

law defenses: The defense of the fellow - servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of some one whose duties are prescribed by statute: Provided, however, That such provision depriving a defendant employer of certain common law defenses under the circumstances therein set forth shall not apply to an action brought against a county court, board of education, municipality, or other political subdivision of the state or against a casual employer or an employer of employees in agricultural service.

Sec. 9. Election of Employer to Provide Own System of Compensation.—Notwithstanding anything contained in this chapter, employers subject to this chapter who are of sufficient financial responsibility to insure the payment of compensation to injured employees and the dependents of fatally injured employees, whether in the form of pecuniary compensation or medical attention, funeral expenses or otherwise as herein provided of the value at least equal to the compensation provided in this chapter, or employers of such financial responsibility who maintain their own benefit funds, or system of compensation, to which their employees are not required or permitted to contribute, or such employers as shall furnish bond or other security to insure such payments, may, upon a finding of such facts by the compensation commissioner, elect to pay individually and directly, or from such benefit funds, department or association, such compensation and expenses to injured employees or fatally injured employees' dependents. The compensation commissioner shall require security or bond from such employer, to be approved by him, and of such amount as is by him considered adequate and sufficient to compel or secure to such employees, or their dependents, payment of the compensation and expenses herein provided for, which shall in no event be less than the compensation paid or furnished out of the state workmen's compensation fund in similar cases to injured employees or the dependents of fatally

injured employees whose employers contribute to such fund. Any employer electing under this section shall on or before the twentieth day of the first month of each quarter, for the preceding quarter, file with the commissioner a sworn statement of the total earnings of all his employees subject to this chapter for such preceding quarter, and shall pay into the workmen's compensation fund a sum sufficient to pay his proper proportion of the expenses of the administration of his chapter, as may be determined by the commissioner. The commissioner shall make and publish rules and regulations governing the mode and manner of making application, and the nature and extent of the proof required to justify the finding of facts by the commissioner, to consider and pass upon such election by employers subject to this chapter, which rules and regulations shall be general in their application. Any employer subject to this chapter who shall elect to carry his own rsik and who has complied with the requirements of this section and the rules of the compensation commissioner shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however, occurring, after such election and during the period that he is allowed by the commissioner to carry his own risk; provided the injured employee has remained in his service with notice given, as provided for in section seven of this article, that his employer has elected to carry his own risk as herein provided. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action, as aforesaid, which the employee or his or her parents would otherwise have.

Any employer whose record upon the books of the compensation commissioner shows, a liability against the workmen's compensation fund incurred on account of injury to or death of any of his employees, in excess of premiums paid by such employer, shall not be granted the right, individually and directly or from such benefit funds, department or association, to compensate his injured employees and the dependents of his fatally injured

employees until he has paid into the workmen's compensation fund the amount of such excess of liability over premiums paid, including his proper proportion of the liability incurred on account of explosions, catastrophes or second injuries as defined in section one, article three of this chapter; occurring within the state and charged against such fund.

All employers who have heretofore elected, or shall hereafter elect, to pay compensation and expenses directly as provided in this section, shall, unless they give the catastrophe and second injury security or bond hereinafter provided for, pay into the surplus fund referred to in section one, article three of this chapter upon the same basis and in the same percentages, subject to the limitations herein set forth, as funds are set aside for the maintenance of the surplus fund out of payments made by premium-paying subscribers, such payments to be made at the same time as hereinbefore provided with respect to payment of proportion of expenses of administration. In case there be a catastrophe or second injury, as defined in section one, article three of this chapter, to the employees of any employer making such payments, the employer shall not be liable to pay compensation or expenses arising from or necessitated by the catastrophe or second injury, and such compensation and expenses shall not be charged against such employer, but such compensation and expenses shall be paid from the surplus fund in the same manner and to the same extent as in the case of premium-paying subscribers.

If an employer elects to make payments into the surplus fund as aforesaid, then the bond or other security required by this section shall be of such amount as the commissioner considers adequate and sufficient to compel or secure to the employees or their dependents payment of compensation and expenses, except any compensation and expenses that may arise from, or be necessitated by, any catastrophe or second injury, as defined in section one, article three of this chapter, which last are secured

by and shall be paid from the surplus fund as hereinbefore provided.

If any employer elect not to make payments into the surplus fund, as hereinbefore provided, then, in addition to bond or security in the amount hereinbefore set forth, such employer shall furnish catastrophe and second injury security or bond, approved by the commissioner, in such additional amount as the commissioner shall consider adequate and sufficient to compel or secure payment of all compensation and expenses arising from, or necessitated by, any catastrophe or second injury that might thereafter ensue.

All employers hereafter making application to carry their own risk under the provisions of this section, shall with such application, make a written statement as to whether such employer elects to make payments a aforesaid into the surplus fund, or not to make such payments and to give catastrophe and second injury security or bond hereinbefore in such case provided for.

All employers who have heretofore elected to carry their own risk under the provisions of this section shall be deemed to have elected to make payments into the surplus fund unless, within thirty days after the effective date of this act, they notify the commissioner in writing to the contrary: Provided, however, That such employers, as have heretofore elected, under the rules heretofore promulgated by the commissioner, not to make payments into the surplus fund, shall be deemed to have elected to give the catastrophe and second injury security or bond hereinbefore provided for and not to make payments into the surplus fund. Any catastrophe and second injury security or bond heretofore given under rules and regulations promulgated by the commissioner and approved by him shall be valid under this section, and any election heretofore made under the rules and regulations of the commissioner to make payments into the surplus fund shall be valid and protective to the person so electing

from and after the date of such election.

In any case under the provisions of this section that shall require the payment of compensation or benefits by an employer in periodical peyments, and the nature of the case makes it possible to compute the present value of all future payments, the commissioner may in his discretion, at any time compute and permit or require to be paid into the workmen's compensation fund an amount equal to the present value of all unpaid compensation for which liability exists, in trust; and thereupon such employer shall be discharged from any further liability upon such award, and payment of the same shall be assumed by the Workmen's Compensation Fund.